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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,

Petitioners,

v.

TOWN OF FREMONT,

Respondent.

On Petition for Writ Of Certiorari To
The Supreme Court of New Hampshire

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Liability for a Fifth Amendment Taking:** When a state's highest court declares a growth control regulation "invalid *ab initio,*" but a town had enforced that illegal regulation in excess of its police powers against a specific piece of property, is the town liable to the affected property owner for a taking because it has failed to "substantially advance legitimate state interests"? (*Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980)).

2. **Liability for a Fifth Amendment Taking:** Alternatively, when a state's highest court declares a growth control regulation "invalid *ab initio*" but a town had enforced that regulation against a specific piece of property, should that illegal municipal conduct be considered under the "character of government action" factor set forth in *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978), as one element to determine whether the town is liable for a taking?

3. **Remedy for a Fifth Amendment Taking:** Does the "self-executing character" of the Takings Clause compel the payment of "just compensation" to an aggrieved property owner for the time period in which a growth control regulation, declared "invalid *ab initio*" by a state's highest court, was enforced against a specific piece of property? (*First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987)).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The Petitioners are Henry Torromeo, a sole proprietor, and MDR Corporation, a small, family-owned business incorporated in the State of New Hampshire and run by brothers Mark and Daniel Post, and their father, Russell Post. MDR Corporation has no parent or subsidiary corporation. The Petitioners are in the business of developing and building single-family home sites.

The Respondent is the Town of Fremont, a municipal corporation in the southeast corner of New Hampshire near the Massachusetts border.

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PETITION FOR WRIT OF CERTIORI

Henry Torromeo and MDR Corporation ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of New Hampshire, dated December 13, 2002. Appendix ("App.") 1.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire is reported at 813 A.2d 389 (N.H. 2002). (App. 1-6.) Orders of the New Hampshire Superior Court awarding Petitioners monetary damages (App. 7–17), and finding liability on the part of the Town as a matter of law for its land-use decisions (App. 18–25), are not reported.

JURISDICTION

The judgment of the New Hampshire Supreme Court was entered on December 13, 2002. (App. 1.) On February 12, 2003, Justice Souter extended the time to petition for certiorari to and including April 14, 2003. (App. 55.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use without just compensation." It is applicable to the States through the Fourteenth Amendment,[1] which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

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[1] See *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001), citing *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226 (1897).

Article 12, Part 1 of the New Hampshire Constitution, the State's corollary to the Takings Clause, provides in pertinent part: "But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." (App. 39.) This provision has been interpreted to require the payment of compensation for a taking. *Burrows v. Keene,* 432 A.2d 15, 19 (N.H. 1981).

STATEMENT OF THE CASE

Three points need to be made at the outset. First, the key fact in this case is that the Town of Fremont, New Hampshire (the "Town"), has applied and enforced an *illegal* growth control ordinance—so declared by the State's highest court—to inhibit otherwise legal development of Petitioners' land.

Second, Petitioners do not dispute that the Town has a legitimate interest to control growth. However, Petitioners *do* contest the constitutionality of the Town's actions when it enforced an illegal law against them. Certiorari should be granted to clarify that a municipality can violate the Takings Clause when it enforces an illegal land-use law, which a court declares was invalid from the start, and refuses to provide the constitutional remedy of "just compensation" promised by the Fifth Amendment.

Third, the posture of this case is a challenge to government action applying a land-use regulation to specific parcels of land. This is not a facial challenge against the constitutionality of an ordinance. Last term, the Court stated that the specter of takings liability rises in as-applied cases such as this one. See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302, 334 (2002).

A. Petitioners' Plans to Build 19 New Homes in Fremont, New Hampshire.

Originally part of Exeter, New Hampshire until it was incorporated in 1764, the Town of Fremont (the "Town") was first named "Poplin" after a prosperous mill town in England.[2] In 1854, the Town was re-named in honor of John C. Fremont, the first presidential candidate of the Republican party, who lost to Democrat James Buchanan in the 1856 election. Today, Fremont is a bedroom community of suburban Boston, a quiet town of neighborhoods that contain large residential lots with homes built from the same hardwood trees sustained since colonial times.

This case concerns two residential subdivisions in the Town. Petitioner MDR Corporation owned a 14-lot subdivision known as "Glidden Hill Estates." Petitioner Henry Torromeo owned the last five lots in a 27-lot subdivision known as "Mason's Corner." Both Petitioners desired to build homes on their lots and then sell the improved parcels. The Fremont Planning Board had fully reviewed and approved both projects to accommodate single-family homes.[3]

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[2] See www.seacoastonline.com/living/fremont.htm (last visited Apr. 8, 2003). Famous for its heavy growth of high quality hardwoods, the English Crown had reserved the Town's best trees for ship masts, but the Townspeople spirited off the remainder of the hardwoods to construct their homes and barns. Alarmed by the timber harvests, the royal Governor dispatched a surveyor to inspect the local mill for illegally cut mast trees. In 1734, the Mast Tree Riot took place in the Town, where locals rebelled by cutting down the tall trees prior to the surveyor's arrival. The Townspeople then later returned disguised as Indians and ambushed ten of the surveyor's troops. See www.newhampshire.com/pages/histmarkerseacoast.cfm (last visited Apr. 8, 2003).

[3] Navigating the subdivision approval process in New Hampshire is no small task. In accordance with zoning and subdivision regulations, Petitioners were obligated to prepare perimeter surveys, evaluate the

In March of 1999, the Town "adopted" the subject Growth Control Ordinance (the "Ordinance"), which gave the Planning Board authority to limit the number of building permits for residential units. (App. 45-51.) On April 14, 1999, the Fremont Planning Board acted on this authority by imposing "Growth Control and Permit Limitations" to restrict the number of building permits that it would issue to property owners during the year April 14, 1999, through April 13, 2000. (App. 52-53.)[4]

After the Ordinance's effective date, the Planning Board approved the Glidden Hill project and MDR requested six building permits to construct single-family homes at the site. The Town applied the Ordinance to MDR's project, granted only five permits, and told MDR it would have to wait at least a year, until April 2000, at the earliest until additional permits for Glidden Hill could issue. After the Town issued only five permits, MDR applied for permits on the remaining nine lots to fully build-out the subdivision, which the Town also denied.

With regard to Mason's Corner, Torromeo personally owned the last five remaining house lots in the 27-lot subdivision. (He had previously built homes on and sold the other 22 lots.) This project was recorded with the county and eligible for building permits as of February 6, 1997—more than

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topography of the property, perform high intensity soil surveys, and develop fully engineered plans showing all roadways and utilities. Additionally, Petitioners were required to secure various state permits, including dredge and fill permits, site specific permits, and curb cut permits.

[4] The Planning Board's "Growth Control and Permit Limitations" determined that a maximum of twenty-six (26) permits for residential construction could be issued throughout the Town, in the year from April 14, 1999 through April 13, 2000. (App. 52, ¶2.). Once a permit was issued, a builder had only 30 days to begin construction or else the permit would lapse. (App. 53, ¶3B.)

two years before the Town adopted the Ordinance in March 1999. Because plats were recorded prior to the Ordinance, Mason's Corner qualified as a vested subdivision and was "exempt from all subsequent changes [in] zoning ordinances...for a period of four years...." See RSA 674:39. (App. 43.) Nonetheless, when Torromeo applied for building permits on the five remaining lots in September 1999, the Town ignored Mason Corner's vested status and refused to issue the permits because the maximum number of approvals allowed by the Ordinance had been granted by that time.

A builder with a building lot, but no building permits, is denied use of his property. In addition to complying with all subdivision requirements, both MDR and Torromeo had built and paved the roads necessary to accommodate their plans, in reliance on prior Town and state approvals. See *supra* n. 3. Consequently, for roads alone, MDR spent over $225,000 and Torromeo spent over $775,000 for their respective projects. With unimproved lots valued at $85,000 each, both MDR and Torromeo could not build, had nothing of value to sell, and were not in a financial position to start over in another community, because their capital was tied up in the Town of Fremont.

B. The New Hampshire Courts Decide That the Growth Control Ordinance is "Invalid, *Ab Initio*," and That the Town Must Issue Building Permits to the Petitioners.

Ordinarily, it would have been acceptable for the Town to deny Petitioners' building permits for a period of time. Except in this case there is a crucial distinction. The Town denied the permits based on an Ordinance that was ultimately deemed *illegal* by the New Hampshire courts, because it lacked the statutory requirements to support a valid growth control law.

After their respective building permits were denied, MDR and Torromeo each filed suits against the Town for injunctive relief to compel permit issuance. In the MDR suit, New Hampshire Superior Court Justice Walter Murphy granted the requested injunction in a decision dated December 27, 1999. (App. 28-31.) He decided that the permits should have been issued because the Ordinance was "invalid, *ab initio*"[5] for failure to meet requirements established by the New Hampshire legislature. (App. 30.) The Town appealed to the New Hampshire Supreme Court. On June 26, 2000, it summarily affirmed Justice Murphy's decision that the Ordinance was "invalid, *ab initio.*" (App. 27.)

In a nutshell, the lower courts found the Ordinance illegal because it was never supported by a validly enacted Capital Improvement Program ("CIP"), a statutory prerequisite in New Hampshire for any growth control ordinance. See RSA 674:22 (App. 42.) A CIP contemplates the orderly construction of infrastructure projects like roads and sewers to control the timing of growth and to accommodate the community's projected needs. Under New Hampshire law, the local legislative body (known as the "Town Meeting") may regulate growth by authorizing the Planning Board "to prepare and amend a recommended program of municipal capital improvement projects over a period of at least 6 years." See RSA 674:5 (App. 41). To fully realize local democratic processes and foster public input, New Hampshire law directs that the Planning Board must publish a "warrant article" that "distinctly state[s]" the "subject matter of all business to be acted upon at the Town Meeting...."[6] RSA 39:2. (App. 40.)

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[5] Or, "[f]rom the beginning." *Black's Law Dictionary* 4 (7th ed. 1999).

[6] "It has long been the law of [New Hampshire] that the purpose of [the warrant] requirement is to inform the inhabitants of the business upon which

Under New Hampshire law, therefore, the Town was required to publish a warrant article informing the public that the Planning Board would be preparing a CIP.

But the Town never published such a warrant providing notice of the preparation of a CIP. As a result, the Town's citizens were deprived of a full and fair opportunity to speak to the vital issue of how, when, and where their community should grow. Without a valid CIP, the New Hampshire courts decided that the Ordinance—which propped the Town's denial of Petitioners' building permits—was "invalid, *ab initio*" and never should have been enforced. (App. 27, 30.)[7] Accordingly, on June 26, 2000, the Town issued the nine remaining building permits to MDR so homes could be built at Glidden Hill.

With regard to Mason's Corner, while the Town denied the building permits by color of the illegal Ordinance, Torromeo never even had to contest the Ordinance's statutory validity. His case was simpler because his last five lots were "vested" under New Hampshire statute, RSA 674:39 (see App. 43), and by law were exempt from the permit limitations of the Ordinance. Thus, on January 31, 2000, Superior Court Justice Richard Galway determined that building permits should issue for Mason's Corner. (App. 32-38.) The Town did not appeal this decision. Ultimately, in February 2000, the Town issued

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they are called to act in the meeting, to bring before the town substantially and intelligently the subject with which it has to deal." *Opinion of the Justices,* 134 A.2d 281, 283 (N.H. 1957) (citations omitted).

[7] Superior Court Judge Murphy rejected the Town's position that, at the end of its March 11, 1987 Town Meeting, a motion was made to appoint a committee to study the development of a future CIP. The motion was made after the Town Meeting had already considered 43 other published warrant articles under other business. But not a single pre-published warrant notified the public that a CIP would be addressed. (App. 30.)

the five permits enabling Torromeo to build the last homes at Mason's Corner.

C. Petitioners' Takings Lawsuits in State Court for Compensation.

Neither Torromeo's nor MDR's odyssey in the New Hampshire courts was over yet. Although permits were eventually issued to them, they had received no economic damages for the losses they sustained while the Town applied the illegal Ordinance to their respective properties. To obtain the remedy of "just compensation" that the Fifth Amendment makes available, Torromeo and MDR each filed actions in Rockingham County Superior Court for a taking under the U.S. and (New Hampshire) Constitutions.

At the start of the takings phase of their suits, MDR and Torromeo filed motions for summary judgment on the issue of liability. On October 3, 2000, the trial court initially denied the motions in a one-sentence order. (App. 26.) The trial court apparently accepted the Town's argument that the Ordinance was "merely" defective procedurally and the law itself needed to be "unconstitutional" before a taking would arise.

MDR and Torromeo then filed a "Request for Ruling of Law,"[8] arguing that the Town's refusal to issue building permits in reliance on the "invalid, *ab initio*" Ordinance was in and of itself an unconstitutional taking. On January 17, 2001, Superior Court Justice Kenneth McHugh reversed himself. He now believed that an award of damages *was* appropriate and Petitioners did "not have to prove the Ordinance is unconstitutional" to recover monetary relief. (App. 24.)

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[8] This procedure is allowed by New Hampshire Superior Court Rule 141 (parties may request "interlocutory orders...relative to proceedings preparatory for a hearing on the merits").

The Town then filed a motion for reconsideration because the trial court's January 17, 2001, order was inconsistent with its previous ruling denying liability on summary judgment. On March 19, 2001, the Superior Court formally joined the Torromeo and MDR takings actions, and found in hindsight that it should have initially granted Petitioners' motions for summary judgment. (App. 21.) It ruled that Petitioners were "entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance. In this Court's view those economic losses are compensable whether or not a 'taking' has occurred under existing case law." (App. 20-21.) Thus, although the Superior Court hesitated to expressly hinge its finding of liability on the constitutional theory of a taking, it nonetheless found that the Town owed Petitioners damages for the time period in which the invalid Ordinance was enforced to deny issuance of the building permits.

A trial on damages came next. On September 26, 2001, Superior Court Justice Gillian Abramson found and ruled that Torromeo was entitled to the carrying costs and fair market rental value for his five unbuildable vested lots from August 26, 1999, through February 2000.[9] (App. 11.) Thus, the court ordered the Town to compensate Torromeo in the amount of $23,800. (App. 15.) With regard to MDR, the court found damages were due for the nine lots at Glidden Hill from August 26, 1999, through June 2000.[10] (App. 11.) Compensation for MDR was thus ordered in the amount of $71,600. (App. 15.)

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[9] August 26, 1999 was the date that building permits were no longer available under the invalid Ordinance. February 2000 was the date that building permits were again issued for Mason's Corner. (App. 11-12.)

[10] August 26, 1999 was the date that building permits were no longer available under the invalid Ordinance. June 2000 was the date that building permits were again issued for Glidden Hill. (App. 11-12.)

D. The New Hampshire Supreme Court's Decision.

The Town appealed to the New Hampshire Supreme Court. It reversed. (App. 1-6.) It decided that the Town was *not* liable to either Torromeo or MDR for damages. The New Hampshire Supreme Court thought "the trial court erred in failing to distinguish between an ordinance that is unconstitutional and one that is merely unenforceable due to a procedural defect in its enactment." (App. 4-5.) A summary of its ruling follows:

- **Just Compensation *Is* Due** only when a court "determin[es] that the ordinance is unconstitutional and constitutes a taking...." (App. 6.) In other words, the regulation *itself* must be deemed unconstitutional to support a finding of takings liability. ***(But this Court has uniformly rejected the notion that a taking occurs in the context of facial challenges against regulations. See infra at p. 20.)***

- **Just Compensation Is *Not* Due** from "an erroneous planning board decision based upon an otherwise valid regulation." (App. 5.) ***(But this Court has repeatedly held that takings liability arises precisely where enforcement of valid laws go "too far." See infra at pp. 20-21.)*** The New Hampshire Supreme Court thought this case presented a situation of "mere[ ]... municipal error." (App. 6.) ***(But this Court has never stated that enforcement of a judicially invalidated law can be dismissed as a "mere" error. See infra at p. 21.)*** Accordingly, "judicial reversal of the erroneous action is the only remedy." (App. 6.) ***(But this Court has made clear that just compensation is the only remedy to redress a taking, and it must be paid to cover losses***

during the time that an invalid regulation is applied to particular property owners. See infra at pp. 22-25.)

This Petition followed.

REASONS FOR GRANTING THE WRIT

I. THE NEW HAMPSHIRE SUPREME COURT HAS SUBVERTED AND IGNORED THIS COURT'S TEST FOR REGULATORY TAKINGS LIABILITY.

Liability for a regulatory taking arises under two distinct modes of analysis: where the regulation (1) fails to "substantially advance legitimate state interests" or (2) "denies an owner economically viable use of his land." *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). See also *Dolan v. City of Tigard,* 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 485 (1987). The *Agins* test is disjunctive. Government is liable for a taking where regulation *either* fails to substantially advance a legitimate state interest *or* deprives the owner of economically viable land use. See, e.g., John J. Delaney, *What Does it Take to Make a "Take"? A Post-Dolan Look at Evolution of Regulatory Takings Jurisprudence in the Supreme Court,* 27 Urb. Law. 55, 58 (1995).

Certiorari should be granted because the New Hampshire Supreme Court misapplied both prongs of the *Agins* test. When the Town enforced the invalid Ordinance it exceeded the scope of its police power, and thus did not "substantially advance" any legitimate government interest (failing *Agins* Prong 1). Alternatively, enforcement of the invalid Ordinance must at least be one factor that the court below should have considered to decide if Petitioners were deprived of economically viable use of their land (under *Agins* Prong 2). Either way, this

Court's tests for takings liability have been subverted and ignored.

A. When the Town Exceeded its Police Power, it Failed to "Substantially Advance" a Legitimate Public Interest and Became Liable for a Taking.

The Court has recognized that its cases to date have only directly addressed the "substantial advancement" prong in the "context of required dedications or exactions" attached as conditions to permit *approvals.* See *City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 704 (1999). Last term, the Court invited the opportunity to consider the "substantial advancement" prong in a case like this, concerning permit *denials.* In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002), the Court declined to hold that moratoria stopping development for 32 months amounted to a *per se* taking in a facial challenge against the regulations. However, Justice Stevens' majority opinion stressed that "[c]onsiderations of 'fairness and justice' " could have supported a finding that the "moratoria were takings based on any of seven different theories." *Id.* at 333. The "[s]ixth" of these theories was that "petitioners might have argued that the moratoria did not substantially advance a legitimate state interest, see *Agins* and *Monterey.*"[11] *Id.* at 334. The sixth theory from *Tahoe-Sierra* is the precise situation presented here.[12] This Petition allows the Court to assess the "substantial

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[11] In *Monterey*, the Court found that whether a city's decision to deny a development plan "substantially advances legitimate public interests within the meaning of our regulatory takings doctrine...is probably best understood as a mixed question of fact and law," and was thus an appropriate jury question. 526 U.S. at 721.

[12] An independent basis upon which to grant this Petition is to clarify the "seventh" theory identified in *Tahoe-Sierra*, namely, whether application of a regulation restricting growth is a taking under the ad hoc balancing test of

advancement" test when a regulatory body denies development permits through invalid exercise of its police powers. [13]

Under *Agins* prong 1, this Court's "cases describe the condition for abridgment of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest." *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 841 (1987) (emphasis in original). The Court is "inclined to be particularly careful about the ['substantial'] adjective" when there is a "heightened risk" that the land-use restriction fails to further "the stated police-power objective." *Id.* In Justice Brennan's plurality dissent from *San Diego Gas & Electric Company,* he also drew the connection between a sovereign's police power and the Takings Clause. He declared that the California courts "flatly contradict[ed] clear precedents of this Court" when they held that "a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of law constitute a 'taking' within the meaning of the Fifth Amendment." *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 647 (1981) (Brennan, J., dissenting). And Justice O'Connor has explained that "[t]he first question" in a takings analysis is whether "application of a regulation constitutes a valid exercise of the police power." *Palazzolo v. Rhode Island,* 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).

Here, the governmental action at issue fails even this first question. When the Town enforced the illegal Ordinance it exceeded the scope of its police powers. Thus, the Town's conduct was not "coterminous" with the Takings Clause and it

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Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). See *Tahoe-Sierra,* 534 U.S. at 334. *Infra* at pp. 16-20.

[13] "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals [of the people] ...." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 569 (1991).

became liable to pay just compensation when it blocked development on Petitioners' land. See *Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 240 (1984) ("the 'public use' requirement is ... coterminous with the scope of a sovereign's police powers").

Admittedly, the Town has a legitimate interest to administer the pace of growth within its borders. But that interest was not advanced, "substantially" or otherwise, when the Town applied the *illegal* Ordinance to deny Petitioners' building permits. How could the Town further its land-use planning goals by engaging in illegal conduct? Indeed, after the New Hampshire Supreme Court affirmed that the Ordinance was "invalid, *ab initio,"* Petitioners obtained their permits and building proceeded. For a fact, none of the "Purposes" or "Findings" that propped-up the Ordinance (App. 45-46) were advanced in this case *at all.*

Nollan is a leading case that explores the "substantial advancement" prong. There, the landowners wanted to expand a beachfront bungalow. The California Coastal Commission approved expansion on the condition that the owners grant a permanent easement providing the public with lateral access across their beachfront lot. The Court decided that the California regulators were liable for a taking because there was no "essential nexus" between the demanded easement condition for lateral access, and the government's stated justification to provide the public with visual access to see the beach from the highway behind the Nollans' home. *Nollan,* 483 U.S. at 837. As the Court wrote:

> Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban,

> the building restriction is not a valid regulation of land-use but "an out and out plan of extortion."

Id. at 837 (citing *J.E.D. Assocs., Inc. v. Atkinson,* 432 A.2d 12, 14-15 (N.H. 1981).

Under *Nollan*, the Town of Fremont's improper refusal to issue building permits in reliance on the illegal Ordinance "utterly fail[ed] to further the end advanced as the justification for the prohibition." *Nollan,* 483 U.S. at 837. The Town's otherwise valid purpose was "completely set adrift from its constitutional moorings" when it purported to achieve its growth planning objectives under the guise of an illegal law. See *Dolan v. City of Tigard,* 512 U.S. 374, 387 (1994). Plainly, the Takings Clause does not permit government to "leverag[e]...the police power" in this manner. *Nollan,* 483 U.S. at 837 n.5.

The consequences of rejecting takings liability where government surpasses the already-broad latitude of its police power would be unfortunate. If the decision below stands, government can knowingly or negligently avoid takings liability by enacting growth control laws that exceed legislative authority, derogate public notice requirements, or disregard mandated statutory procedures. Gaming the municipal system in this regard must be discouraged. It "would create a perverse system of incentives" to find that government could be liable for a taking when it enforces valid laws, but is immune from takings liability in the face of regulatory subterfuge that enacts growth control laws which purposefully defy legal requirements. See *Tahoe-Sierra,* 535 U.S. at 340. Or, if a taking can arise when application of a *valid* land use regulation "goes too far," see *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), then application of a land-use regulation that

was *never valid* goes *even further* beyond constitutional parameters.

"The State may not... secure a windfall for itself" by avoiding the Fifth Amendment's just compensation remedy when it acts outside the scope of its police powers. *Palazzolo,* 533 U.S. at 627. Accordingly, the Court's review is warranted to address the Town's liability under the *Agins* "substantial advancement" prong.

B. Alternatively, the New Hampshire Supreme Court Should Have Considered the Town's Action in Enforcing an Illegal Regulation Under *Penn Central*'s Multi-Factor Test for Takings Liability.

Certiorari should also be granted to address the Town's takings liability under prong 2 of the *Agins* test, where regulation "denies an owner of economically viable use of his land." *Agins,* 447 U.S. at 260. In this regard, the New Hampshire Supreme Court's decision conflicts with *Tahoe-Sierra, Palazzolo,* and *Penn Central.*

A motif connects the "more recent vintage" of this Court's regulatory takings jurisprudence; it is "characterized by 'essentially ad hoc, factual inquiries,' *Penn Central,* 438 U.S. at 124, ... designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo,* 533 U.S. at 636 (O'Connor, J., concurring)." *Tahoe-Sierra,* 535 U.S. at 322. Justice O'Connor stated the Court's favored position in her *Palazzolo* concurrence:

> We have eschewed "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons"....The outcome "depends largely 'upon the particular circumstances [in that] case.' "
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> * * *
>
> Our polestar ... remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings.

Palazzolo, 533 U.S. at 633 (O'Connor, J., concurring) (citing, *inter alia, Penn Central,* 438 U.S. at 124).[14] Just last month the Court confirmed *Penn Central*'s prominence in *Brown v. Legal Found. of Washington,* 538 U.S. ---, 2003 WL 1523550 (March 26, 2003).

Penn Central established three factors to determine regulatory takings liability where, as here, the government denies land-use permits and thereby deprives the owner economically viable use of property. These factors are: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central,* 438 U.S. at 124.[15] These factors make clear that

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[14] Justice O'Connor's concurrence was cited with favor by *Palazzolo* dissenting Justices Ginsburg, Souter, and Breyer (533 U.S. at 654 n.3), and by Justice Stevens' majority opinion in *Tahoe-Sierra,* 535 U.S. at 327 n. 23.

[15] The Court has identified only two circumstances where *Penn Central* balancing is not appropriate and a *per se*, categorical taking arises: where government commits a physical invasion of property (see *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982)), and where land-use regulation totally deprives any economically viable use of the

"*[t]he purposes served,* as well as the effects produced, by a particular regulation inform the takings analysis." *Palazzolo,* 533 U.S. at 634 (O'Connor, J., concurring (emphasis supplied)).

This case emphasizes the third factor, the "character of the governmental action." Petitioners submit that action taken by the Town outside of its police powers, when it applied the illegal Ordinance to deny the building permits, is at least a fact that the New Hampshire Supreme Court should have considered under a *Penn Central* analysis. But the New Hampshire Supreme Court declared that enforcing an illegal law is "merely" a "municipal error" that is *never* relevant to determine takings liability, and that only laws held to be "unconstitutional" can involve a takings analysis. (App. 6.)

This analysis by the New Hampshire Supreme Court cannot be squared with *Palazzolo*. There, the property owner asserted that the state committed a taking when it applied wetlands regulations to restrict development. The Rhode Island Supreme Court rejected the takings claim, stating that the property owner lacked "reasonable investment-backed expectations" because he acquired title *after* the regulations were enacted. This Court, however, held that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." *Palazzolo,* 533 U.S. at 627. It rejected the state's "sweeping rule" (*id.* at 626), that a takings claim is barred by "the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 630. The Court thus remanded back to the Rhode Island Supreme Court with instructions to conduct a *Penn Central* analysis to determine if the State committed a taking. *Id.* at 632. Justice O'Connor concurred, stating that "interference with investment-backed expectations is one of a number of

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property (see *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992)).

factors that a court must examine." *Id.* at 633 (O'Connor, J., concurring). She stressed that "it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance." *Id.*

So too, here. It was error for the New Hampshire Supreme Court to "expunge" the character of the Town's action from the takings analysis. It should have considered the Town's enforcement of the illegal Ordinance as one element under the *Penn Central* inquiry.

In *Tahoe-Sierra,* this Court also rejected a *per se* argument that a moratoria stopping all development for a temporary period of time (there, 32 months) must always result in a taking. The Court explained its view that "the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case." *Tahoe-Sierra,* 535 U.S. at 321. Because the "temporary nature of a land-use restriction...should not be given exclusive significance one way or the other," (*id.* at 337), the Court refused to find takings liability in a facial challenge to the ordinances. This result cannot be reconciled with the New Hampshire Supreme Court's ruling, which requires that an ordinance itself must be "unconstitutional and constitute[s] a taking." (App. 6.) This Court also made clear that the property owners in *Tahoe-Sierra* "might have prevailed under a *Penn Central* analysis" if they "had challenged the application of the moratoria to their individual parcels" (*id.* at 334)—the exact analysis that the New Hampshire Supreme Court failed to conduct. The decision below contradicts *Tahoe-Sierra* from every angle.

Palazzolo and *Tahoe-Sierra* reject "[t]he temptation to adopt what amount to *per se* rules in either direction ...." *Palazzolo,* 533 U.S. at 636. Because the New Hampshire Supreme Court

could not resist that temptation, certiorari should be granted so this Court can ensure that the enforcement of an illegal regulation is a fact that is appropriately weighed in the takings analysis.

C. The New Hampshire Supreme Court Flatly Contradicted This Court's Cases When it Ruled That Takings Liability can be Found Only Where an Ordinance is Itself Unconstitutional.

The New Hampshire Supreme Court believed that the Town could not be liable to pay just compensation "[a]bsent a determination that the ordinance is unconstitutional and constitutes a taking...." (App. 6.) It was wrong. This Court has never hinged takings liability on the unconstitutionality of a regulation *itself.* In *Tahoe-Sierra,* the Court rejected a facial challenge to the moratoria at issue and recognized that the property owners faced a steep "uphill battle" in arguing that "the mere enactment" of a law is *per se* unconstitutional. *Tahoe Sierra,* 535 U.S. at 320 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 495 (1987)). See also *United States v. Riverside Bayview Homes,* 474 U.S. 121, 126 (1985) ("the mere assertion of regulatory jurisdiction" under the Clean Water Act Section 404 permit program "does not constitute a regulatory taking").

The New Hampshire Supreme Court also turned the Fifth Amendment on its head when it stated that takings liability could not arise from a land-use decision based on "an otherwise valid regulation." (App. 5.) But the text of the Fifth Amendment itself expressly contemplates takings for a valid "public use." U.S. Const. Amend. V. Last month, Justice Stevens wrote for a unanimous Court that one of the "conditions" imposed by the Fifth Amendment is that a taking must be for "public use." *Brown v. Legal Found. of*

Washington, 538 U.S. ---, 2003 WL 1523550 (March 26, 2003).[16] Accordingly, takings liability indeed arises where the government enforces a valid law to achieve a legitimate public purpose.[17] The Constitution is infringed when such a valid law goes "too far" in its application and the property owners, as here, are not compensated.

In *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 322 (1987), the Court stated that a taking must be distinguished from "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *Id.* at 322. Of course, "normal" delays typically arise in the course of the land-use approval process, where *valid* laws are *legally* enforced. It abuses this Court's regulatory jurisprudence to find that application of a judicially invalidated law is a "normal" delay.

In the end, "[f]rom the property owner's point of view, it may matter little whether his land" is rendered unusable by an unconstitutional law or one that is merely illegal on some other ground. See *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 652 (Brennan, J., dissenting). "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does.*" *Hughes v. Washington,* 389 U.S. 290, 298 (1967) (Stewart, J., concurring) When the Town applied the illegal Ordinance, this was not a mere "error" to be sloughed-off.

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[16] The second "condition" is that "just compensation must be paid to the landowner." *Brown v. Legal Found. of Washington,* 538 U.S. ---, 2003 WL 1523550 (2003). See *infra* at pp. 22-23.

[17] See, e.g., *Tahoe-Sierra,* 535 U.S. at 333-34 (valid laws enforced to protect Lake Tahoe could lead to a taking); *Palazzolo,* 533 U.S. at 632 (enforcement of valid wetlands protection law could render state liable for a taking); *Lucas,* 505 U.S. at 1003 (state liable for a taking in enforcing valid beachfront management law).

* * *

To conclude, certiorari should be granted because this Court's line of takings cases were rejected when the court below:

- Failed to consider *Agins* Prong 1, insofar as the Town's application of an illegal law failed to substantially advance a legitimate state interest;
- Failed to balance the Town's illegal conduct as a relevant factor under the *Penn Central* test; and
- Failed to follow this Court's holdings that a law itself does not need to be "unconstitutional" to support a finding of liability under the Takings Clause.

II. THE NEW HAMPSHIRE SUPREME COURT HAS SUBVERTED AND IGNORED THIS COURT'S DECISIONS THAT JUST COMPENSATION IS THE SOLE CONSTITUTIONAL REMEDY FOR A TAKING.

As explained in Part I, certiorari should be granted so the Court can address the "logically prior question whether [application of] the temporary regulation at issue had in fact constituted a taking." *Tahoe-Sierra,* 535 U.S. at 328. After addressing the antecedent question of the Town's takings liability, certiorari should be granted so this Court can correct the New Hampshire Supreme Court's erroneous ruling on the *remedy* for a taking.

Of all the fundamental protections set forth in the Bill of Rights, the Takings Clause is unique. When it is infringed, it is the only clause that requires the payment of a monetary remedy – "just compensation" – to an aggrieved citizen. "Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.'" *First English,* 482 U.S. at

314. Thus, an award of compensation is triggered not because (or until) a regulation is declared unconstitutional, but rather because of the "self-executing character of the constitutional provision with respect to compensation." *Id.* at 316 (citations omitted). Where the government's activities have already worked a taking, "no subsequent action by the government can relieve it of the duty to provide compensation for the period of time during which the taking was effective." *Id.* at 321. Justice Brennan believed the mandate for compensation was evident:

> The Constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first affected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 636 (1981) (Brennan, J. dissenting), endorsed in *First English,* 482 U.S. at 315, 318, 321. The vitality of this rule could not be stronger. Last month, the Justices twice re-confirmed that just compensation is the sole remedy for a taking. *Brown v. Legal Found. of Washington,* 538 U.S. ---, 2003 WL 1523550 (March 26, 2003); *City of Cuyahoga Falls v. Buckeye Community Hope Found.,* 2003 WL 1477301 (March 25, 2003) (Scalia, J., concurring).

The New Hampshire Supreme Court defied these pronouncements when it decided that delayed issuance of "erroneously-denied" building permits was Petitioner's only remedy. (App. 6.) Judicial reversal of the erroneous regulatory action is *not* the remedy countenanced by the Fifth Amendment; the *sole* available constitutional remedy is the award of just compensation. The court below was also wrong in thinking that

compensation is triggered only in cases where "an ordinance is unconstitutional." (App. 6.) *First English* dispensed with this contention: "[I]t would require a considerable extension of [the Court's decisions] to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid." 482 U.S. at 320.

In short, no additional finding of the Ordinance's "unconstitutionality" was necessary, or warranted, to justify the payment of compensation. Particularly instructive is this Court's admonition in *First English*:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land use regulations. But such consequences necessarily flow from any decision upholding a claim of a constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. (482 U.S. at 321.)

It warrants further emphasis that the Town's actions here were not a "mere[ ]...type of municipal error." (App. 6.) Fremont's growth control Ordinance was *never* legal. If the payment of just compensation is triggered for even "proper" interference amounting to a taking, government should not be allowed to avoid the compensatory remedy where its interference is "invalid, *ab initio.*"

Finally, it does not matter if the taking is "temporary" or "permanent,"[18] the Fifth Amendment compels one remedy: just compensation.[19] "[T]emporary takings ... are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. at 318 (citations omitted). Here, because the New Hampshire courts invalidated the growth control Ordinance, Petitioners have sustained a temporary taking. Thus, *First English* directs that Petitioners must be compensated for the time during which the invalid regulation was in effect.

In the end, certiorari should be granted because the New Hampshire Supreme Court ignored the text of the Takings Clause itself and disregarded the constitutional rule of *First English*.

III. THE LOWER COURTS ARE IN CONFLICT REGARDING THE RELEVANCE OF INVALID AND ILLEGAL LAND-USE REGULATION IN THE TAKINGS CONTEXT.

As if clear disregard for this Court's takings jurisprudence were not enough, certiorari should be granted because the lower

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[18] The Court has stated that a "temporary" taking arises in the situation where the offending regulation is invalidated or otherwise removed. See *First English*, 482 U.S. at 310 ("'temporary' regulatory takings [are] those regulatory takings which are ultimately invalidated by the courts"). Implicit in this statement is that a permanent taking results where an otherwise valid ordinance remains in place but "goes too far." The practical difference between a temporary and permanent taking only pertains to the "the proper measure of the monetary relief" owed to the property owners." *Id.*, 482 U.S. at 318 (citations omitted). But whether the taking is temporary or permanent, some amount of compensation would always be due.

[19] See *San Diego Gas*, 450 U.S. at 657 (Brennan, J., dissenting) (takings need not be "permanent and irrevocable").

courts are in a state of confusion. Their opinions clash regarding whether illegal government land-use decisions should be factored in the equation to determine takings liability and remedy. This Court's review is needed to resolve the conflict.

Takings Liability Where Invalid Regulation is in Effect: The highest courts in Connecticut, Wisconsin, and the U.S. Court of Appeals for the Ninth Circuit, have all decided that just compensation is the appropriate remedy for the time period during which property is subject to invalid regulation:

- In *Cumberland Farms, Inc. v. Town of Groton,* 719 A.2d 465 (Conn. 1998), the town improperly denied a variance. Notwithstanding that the property owners retained some use of the service station on their property, the Connecticut Supreme Court held that they could pursue compensation for a temporary taking during the time that it took to litigate the invalidity of the town's denial. The court expressly noted that the town's argument was "contrary to the holding of *First English*...." 719 A.2d at 474.

- In *Eberle v. Dane County Bd. of Adjustment,* 595 N.W.2d 730 (Wis. 1999), the county denied an access permit. The Wisconsin Supreme Court held that the owners could pursue compensation for a temporary taking, notwithstanding that they regained full use of their property when that court eventually overturned the permit denial. The court expressly concluded that the county's argument against compensation was contrary to *First English.* 595 N.W.2d at 738.[20]

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[20] The *Eberle* dissent urged adoption of the position taken by the California Supreme Court in *Landgate,* discussed *infra* at p. 27. 595 N.W.2d at 748.

- Before this Court granted certiorari in *Tahoe-Sierra,* the Ninth Circuit stated that takings liability arises only where a court invalidates a regulation—the exact situation here. Relying on *First English,* the Ninth Circuit stated that "a *permanent* regulation leads to a *'temporary'* taking when a court invalidates the ordinance after the taking." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 216 F.3d 764, 778 (9th Cir. 2000), *aff'd,* 535 U.S. 302 (2002).

No Takings Liability Where Invalid Regulation is in Effect: In stark contrast, the highest courts in New Jersey and California have taken a position closer to the New Hampshire Supreme Court. They state that enforcement of an illegal regulation does *not* render the government liable for a taking:

- In *Landgate, Inc. v. California Coastal Comm'n,* 953 P.2d 1188, 1195 (Cal. 1998), *cert. denied,* 525 U.S. 876 (1998), the California Supreme Court stated that litigation to overturn a "legally erroneous decision of a government agency" is merely part of the normal "approval process" and that such a "regulatory mistake" cannot be compensated as a taking. *Id.* at 1195. The *Landgate* court also elevated *Lucas*'s "total taking" rule and rendered *Penn Central*'s partial taking analysis irrelevant where the government makes illegal land use decisions: Only "[i]f the error is of a particular type—the passage and enforcement of a law or regulation that deprives property of *all value*—then the teaching of *First English* is that such an error is a compensable taking." *Id.* at 1197 (emphasis added).[21]

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[21] Separate dissenting opinions believed that the majority's decision in *Landgate* directly contradicted *First English. Id.,* 953 P.2d at 1205-1212 (dissenting opinions of California Justices Chin, Baxter and Brown).

- In *Pheasant Bridge Corp. v. Township of Warren,* 777 A.2d 334 (N.J. 2001), *cert. denied,* 535 U.S. 1077 (2002), the New Jersey Supreme Court declared that, although the town arbitrarily and unreasonably applied a land use regulation, the landowner did not have a cognizable takings claim during the period in which it successfully challenged the ordinance. Compensation is not due in a situation "with an invalid ordinance in which government went beyond the scope of its zoning power, rather than a valid ordinance that effected a taking." *Id.* at 344.

If not rectified, the split in legal authority will beget more opinions as far removed and disparate as those discussed above. The issue is joined and the conflict is resolute. This Court's guidance is needed.

CONCLUSION

Decisions like the one below will embolden local governments to act carelessly, or even knowingly, in implementing ordinances that are illegal but nonetheless achieve the fashionable goal to halt development. As Justice Holmes recognized: "If...the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared'" (citations omitted). *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Justice Holmes's prescient warning is as compelling today as it was in 1922, when zoning laws barely existed and government regulation of land-use was a foreign concept. But in today's regulatory climate, if the New Hampshire Supreme Court's decision stands, a pattern of municipal abuse is easy to envisage: avoid the Fifth Amendment's restrictions by enforcing invalid laws.

Petitioners respectfully ask this Court to remind the Town of Fremont, and other municipalities tempted to overreach their powers, that their illegal actions have consequences under the Fifth Amendment. They must pay for what they take. "After all, a policeman must know the Constitution, then why not a planner?" *San Diego Gas,* 450 U.S. at 661 n. 26 (Brennan, J., dissenting.)

For all of the foregoing reasons, the Petition should be granted.

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